FILED

No. 95-363 SEP 1 - 1995

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IN THE

Supreme Court of the United States

OCTOBER TERM 1994

DONALD CORRIGAN, JAMES STROVEN,
MICHAEL COOK and WAYNE BUMSTEAD,

Petitioners,

—v.—

THE CITY OF NEWAYGO and
CHARLENE A. CORRIGAN, City Clerk,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

AMERICAN CIVIL LIBERTIES
UNION FUND OF MICHIGAN

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QUESTIONS PRESENTED FOR REVIEW

I. **Whether a city charter provision disqualifying candidates for public office who have outstanding water, sewer or tax bills violates the Equal Protection Clause, as to which the courts of appeals are in conflict.**

II. **Whether a city charter provision disqualifying candidates for public office who have outstanding water, sewer or tax bills violates the First Amendment associational rights of disqualified candidates and their supporters.**

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REFERENCE TO OPINIONS BELOW

The June 7, 1995, opinion of the United States Court of Appeals for the Sixth Circuit is reported at 55 F.3d 1211 (6th Cir. 1995). The September 24, 1993, opinion of the United States District Court for the Western District of Michigan is unreported. Both opinions are reproduced in the appendix to this petition.

STATEMENT OF JURISDICTION

The petitioners seek review of the decision of the United States Court of Appeals for the Sixth Circuit, which was entered on June 7, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XIV, § 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Newaygo City Charter, § 5.4(b):

No person shall be eligible for any elective or appointive City office who is in default to the City.

Newaygo City Charter, § 2.2(l):

The word "default" shall include being delinquent in taxes.

Newaygo City Charter, § 4.10(b):

Within three days after the last date for filing petitions, the Clerk shall make his final determinations as to the validity and sufficiency of each nominating petition and whether or not the candidate has the qualifications required for his respective elective City office by this Charter.

STATEMENT OF THE CASE

The petitioners filed this 42 U.S.C. § 1983 action for declaratory and injunctive relief on July 29, 1993, in the Federal District Court for the Western District of Michigan. In their complaint, the petitioners alleged that the respondents, acting under color of a municipal charter, deprived them of their Fourteenth Amendment right to equal protection of the laws and their First Amendment associational rights. Subject matter jurisdiction was predicated on 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

At an August 31, 1993, hearing on the petitioners' motion for a preliminary injunction, the parties agreed that the pertinent facts were not in dispute. The following facts are adapted from the June 7, 1995, opinion of the United States Court of Appeals for the Sixth Circuit.

Petitioners Donald Corrigan, James Stroven, Michael Cook and Wayne Bumstead are qualified voters in the respondent City of Newaygo ("the City"), a city in Michigan with 1,484 residents. In May 1993, residents of the City, including Corrigan and Stroven, participated in an effort to recall Mayor Thomas Kowalski. Mayor Kowalski resigned before a recall election could be held.

That same month, Cook submitted a petition of candidacy for mayor, and Bumstead submitted a petition of candidacy for a seat on the city council. Cook and Bumstead were former city council members and both had long been active in city politics. Cook and Bumstead filed their candidacy petitions before the May 11, 1993, filing deadline. Corrigan and Stroven supported the candidacies of Cook and Bumstead.

On May 14, 1993, respondent Charlene Corrigan, the City Clerk, notified Cook and Bumstead that their names could not appear on the ballot because they had outstanding debts to the City. Corrigan based her determination on Section 5.4(b) of the Newaygo City Charter, which provides that "No person shall be eligible for any elective or appointive City office who is in default to the City." Section 2.2(l) of the City Charter provides that "The word 'default' shall include being delinquent in taxes."

At the time he filed his petition of candidacy, Cook owed the City $372.63 in delinquent property taxes and $48.67 in sewer and water charges. Cook asserted that he was behind in his property tax payments because he did not have sufficient funds and that his water bill was only eleven days overdue on the date of the filing deadline.

Bumstead owed the City $318.33 in past due property taxes that Bumstead's land contract vendee had failed to pay. Bumstead asserted that he had assumed that the vendee had paid the taxes, as required by the land contract, but agreed that he was ultimately liable for the taxes as the title holder.

Bumstead and Cook subsequently paid their obligations in full before the election. However, they remained ineligible to appear on the ballot because the filing deadline had passed. As a result of Cook's disqualification, Thomas Kowalski, the former mayor who had resigned during the recall campaign, was the only candidate whose name appeared on the mayoral ballot.

The petitioners then filed this action, alleging that the challenged sections of the Newaygo City Charter violated their First Amendment associational rights and their Fourteenth Amendment right to the equal protection of the laws. The petitioners moved for a preliminary injunction in order to have Cook's and Bumstead's names placed on the ballot in time for the November 1993 election.

The district court issued an Opinion and Order denying the preliminary injunction on September 24, 1993, on the ground that the petitioners failed to demonstrate a likelihood of success on the merits. The district court subsequently entered a final judgment disposing of the case.

On June 7, 1995, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court. *Corrigan v. City of Newaygo*, 55 F.3d 1211 (6th Cir. 1995). In rejecting the petitioners' Equal Protection Clause challenge, the Sixth Circuit panel noted that the Third Circuit had struck down a virtually identical charter provision on equal protection grounds. 55 F.3d at 1216 (citing *Deibler v. City of Rehoboth Beach*, 790 F.2d 328 (3rd Cir. 1986)).

ARGUMENT

I. As the Third Circuit Has Held, a City Charter Disqualifying Candidates With Outstanding Debts Is Not Rationally Related to Any Legitimate Governmental Objective and Violates the Equal Protection Rights of the Disqualified Candidates.

The Sixth Circuit's opinion in this case conflicts with the decision rendered by the Third Circuit in *Deibler v. City of Rehoboth Beach*, 790 F.2d 328 (3rd Cir. 1986). In *Deibler*, the Third Circuit struck down, as violative of equal protection, a city charter provision that denied a candidate access to the ballot solely because he owed property taxes to the city. The *Deibler* court concluded that the challenged provision was not rationally related to any legitimate governmental interest. 790 F.2d at 334-337.

The Sixth Circuit has now upheld a functionally identical city charter provision against an identical equal protection challenge. This action, like *Deibler*, was brought by candidates who were denied access to the ballot solely because they owed taxes and/or assessments to the City. The Sixth Circuit held that the charter provision is rationally related to the City's interest in collecting taxes and assessments and therefore justifies the burden on the petitioners' right to ballot access. That holding squarely conflicts with *Deibler*.

This Court has never considered a ballot access restriction such as the one struck down in *Deibler* and upheld here. However, this Court has invoked equal protection to strike down ballot access provisions not rationally related to legitimate governmental purposes, particularly when the impact of such restrictions "falls

with unequal weight on voters, as well as candidates, according to their economic status." *Bullock v. Carter*, 405 U.S. 134, 144 (1972); *see also Turner v. Fouche*, 396 U.S. 346 (1970) (striking down requirement that school board members be freeholders).

The Sixth Circuit in this case and the Third Circuit in *Deibler* agreed that potential candidates have an equal protection right "not to be excluded arbitrarily by the town from appearing on the ballot." *Corrigan*, 55 F.3d at 1216; *Deibler*, 790 F.2d at 333-34. Therefore, a ballot access provision must be rationally related to a legitimate governmental objective in order to survive an equal protection challenge. *Corrigan* at 1216; *Deibler* at 334; *see also Turner*, 396 U.S. at 362 (requirement that school board members be freeholders rests "on grounds wholly irrelevant to the achievement of a valid state objective").

The Third and Sixth Circuits parted company, however, on whether a city charter provision disqualifying candidates who have fallen behind in their tax assessments is rationally related to a valid governmental objective. In *Deibler*, the Third Circuit held that a charter provision requiring a candidate for office to be "a non-delinquent taxable of the City" did not further any legitimate governmental interest. 790 F.2d at 330, 334-37. Therefore, the Third Circuit held that the challenged provision violated the equal protection rights of the plaintiff candidate who was excluded from the ballot because he owed $264 in property taxes. *Id.*, at 329-330, 337.

In particular, the Third Circuit considered and rejected two possible rationales for the challenged provision. First, the court rejected the city's claim that

the charter provision screens out candidates who lack the necessary civic commitment, reasoning that "[t]he individual's decision to pay taxes does not logically reflect his commitment to the city, because the decision may rest solely on economic, ideological or other personal grounds." *Id.* at 334-35. The court cited empirical research demonstrating that a tax delinquency generally "reflected some aspect of the owner's immediate financial situation or considerations related to the operating costs of the property," not a lack of civic commitment. *Id.* at 335. The court also recognized that a tax delinquency may result from clerical errors, from checks lost in the mail, from errors committed by mortgagors, or from general economic conditions in the community. *Id.*

The *Deibler* court also rejected the city's claim that the non-delinquency requirement is necessary to engender public respect for office holders. 790 F.2d at 335-36. The court held that it is for the voters, and not the city, to determine whether a candidate's tax delinquency should disqualify him or her from holding office. *Id.* The *Deibler* court noted that this Court has condemned restrictions on ballot access based on wealth and land ownership. *Id.* at 335 (citing *Turner v. Fouche*, *supra*). The court concluded by asking whether there could be "respect for a system that summarily denies the privilege of elective office to those who, for reasons totally unrelated to their commitment to the community, do not pay taxes[.]" *Id.* at 336.

By contrast, the Sixth Circuit in this case has upheld a ballot access restriction functionally identical to the one struck down in *Deibler*. Like the restriction in *Deibler*, the restriction at issue here disqualifies all candidates who are in "default" to the City of Newaygo,

with "default" defined to include "being delinquent in taxes." Newaygo City Charter, §§ 5.4(b), 2.2(l). Exactly as in *Deibler*, the restriction here was used to disqualify candidates who have demonstrated their commitment to the City through years of civic activism. Exactly as in *Deibler*, the disqualified candidates were delinquent for reasons wholly unrelated to their civic commitment. In addition, one of the candidates, Cook, was disqualified for reasons primarily related to his economic status.

Nonetheless, the Sixth Circuit in this case explicitly rejected the result in *Deibler* and upheld the charter provision on the ground that the provision is rationally related to the "economic purpose of enforcing the City's tax regime." 55 F.3d at 1216. The court concluded that since a functioning tax system was "essential to accomplish an overriding governmental interest," the ballot access restriction here was a rational incentive to force payment of taxes. *Id.* (quoting *United States v. Lee*, 455 U.S. 252, 257-58 (1982)).

The Sixth Circuit's analysis misses the point of rational basis review. No one can seriously dispute that the City has a strong interest in collecting its taxes. Rational basis review, however, requires the court to ask whether the challenged provision is rationally related to the proffered interest. The challenged provision here is not so related for two fundamental reasons.

First, the Sixth Circuit's holding that the ballot access restriction is an "incentive" to citizens to pay their taxes rests on the false assumption that a potential candidate would be current in his or her taxes but for the lack of such an "incentive." 55 F.3d at 1216. In other words, the ballot access restriction works to collect taxes if and only if the tax delinquency is known to, and

can be readily remedied by, the potential candidate before the filing deadline passes.

However, as documented in *Deibler*, the most common causes of tax delinquencies are the taxpayers' lack of money and administrative difficulties, including problems with third party payers, clerical errors, and legitimate disputes over the amount owed. 790 F.2d at 335. "Incentives" such as a ballot access restriction cannot work on such taxpayers. If a taxpayer is delinquent because he or she cannot pay, a provision disqualifying him or her from candidacy will not succeed in collecting more taxes, but will certainly produce a more severe impact on economically disadvantaged candidates. *Cf. Bullock* at 146 (striking down excessive filing fee where "the candidates in this case affirmatively alleged that they were *unable*, not simply *unwilling*, to pay the assessed fees" (emphasis in original)).

Similarly, if the taxpayer is delinquent because a third party failed to make a payment, or because of a clerical error, or because of a dispute over the amount owed, the disqualification provision will not result in the timely collection of taxes. It will result only in the disqualification of an otherwise qualified candidate.

The disqualification provision does not even encourage such a candidate to pay up. The City's charter requires the city clerk to determine whether a candidate is eligible after the filing deadline passes. Newaygo City Charter, § 4.10(b). If the candidate owes taxes or fees, he or she is disqualified and cannot regain a place on the ballot even by paying the assessment. Therefore, a disqualified candidate has no incentive to pay the assessment to save the candidacy.

The two candidates disqualified in this case illustrate the fallacy in the Sixth Circuit's sweeping "tax collection" rationale. Cook explained that he owed $372.63 in property taxes and $48.67 in water and sewer charges because he was temporarily unable to pay. *Corrigan* at 1213. Bumstead asserted that he was unaware that he owed $318.33 in property taxes because a third party, his land contract vendee, had breached his contractual obligation to pay the taxes. *Id.*

Both men eventually eliminated their delinquencies before the election, but the so-called "incentive" provided by the ballot access provision not only did not work to avoid the delinquencies before the filing deadline, but could not have worked. Cook's financial situation and Bumstead's ignorance of the debt made both men "*unable*, not simply *unwilling*, to pay the assessed fees." *Bullock* at 146 (emphasis in original).

The ballot access restriction did not, and could not, cause the candidates to pay their taxes before the filing deadline. The restriction succeeded only in disqualifying two candidates with longstanding and demonstrated commitments to the City. The restriction is particularly suspect because it effectively disqualified one candidate, Cook, because of his financial status at the time of the filing deadline. *Cf. Turner*, 396 U.S. at 364; *Bullock* at 143-47.

The second fundamental flaw in the Sixth Circuit's sweeping "tax collection" rationale is that is does not explain how tax collection is rationally related to qualifications for city office. The City has a legitimate interest in collecting its taxes and fees, and it has ways to promote that interest that are rationally related to the taxes and fees. For example, the City may withhold

services for which fees have not been paid, and it may place a lien on property for which taxes are owing. By contrast, a candidacy for city office has no rational relationship to the City's tax collection interest.

As Cook's and Bumstead's circumstances demonstrate, a tax delinquency is wholly unrelated to qualifications for holding office and is more likely related to the taxpayers' financial situation or to administrative difficulties. *Deibler* at 335. The potential candidates' tax and financial situation cannot serve as a substitute for civic commitment or some other qualification for holding office. *Id.*; *see also Turner* at 364 ("Georgia may not rationally presume that that quality [civic attachment] is necessarily wanting in all citizens of the county whose estates are less than freehold").

This Court's decision in *Turner* illustrates the flaw in the Sixth Circuit's rationale. If the City's interest in tax collection justifies disqualifying candidates with outstanding debts, then surely Georgia's interest in promoting home ownership would have justified disqualifying candidates who were not freeholders. Yet this Court wrote in *Turner* that "it is difficult to conceive of any rational state interest underlying [Georgia's freeholder requirement]." 396 U.S. at 363.

Promoting home ownership and collecting taxes are indeed legitimate governmental objectives. They are not, however, rationally related to a candidate's qualifications for office.

In short, there is no showing that the ballot access restriction is rationally related to the City's interest in tax collection. The restriction falls most heavily on those

candidates, like petitioners Cook and Bumstead, for whom such punitive "incentives" are ineffective to avoid delinquencies, and falls particularly heavily on those candidates whose economic circumstances render them vulnerable to delinquencies. The ballot access restriction is wholly unrelated to the candidates' qualification for office.

Therefore, the City's ballot access restriction lacks a rational basis and violates the equal protection rights of the disqualified candidates and the voters who supported them. The Sixth Circuit's opinion to the contrary conflicts with the Third Circuit's opinion in *Deibler*. The petitioners respectfully request that this Court grant this petition to resolve the conflict and to strike down the City's ballot access restriction.

II. The City Charter Provision Disqualifying Candidates with Outstanding Debts Violates the First Amendment Associational Rights of the Disqualified Candidates and the Voters Supporting Them.

As this Court has recognized in ballot access cases, there is a close relationship between the rights of candidates and the rights of voters who are denied the opportunity to vote for the candidates of their choice. Such a restriction may violate both the voters' right to equal protection of the laws and their First Amendment right of association. *See Bullock*, 405 U.S. at 144 (excessive filing fee scheme "falls with unequal weight on voters, as well as candidates, according to their economic status"); *Anderson v. Celebrezze*, 460 U.S. 780, 787-88 (1980) ("The exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens").

For the reasons given above, the City's ballot access restriction violates the rights of all four petitioners to association. All four petitioners are qualified voters in the City. Corrigan and Stroven supported the candidacies of Cook and Bumstead, and Cook and Bumstead supported their own candidacies.

The City's ballot access restriction therefore deprives each petitioner of the right to vote for the candidates of his choice, *Anderson*, 460 U.S. at 788, and the impact of the restriction falls more heavily on candidates in difficult financial circumstances who, in turn, are more likely to represent the views of voters in similar circumstances. *See Bullock*, 405 U.S. at 144.

CONCLUSION

Therefore, the petitioners respectfully request that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

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Dated: **August 30, 1995**

APPENDIX

APPENDIX

No. 93-2416

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DONALD CORRIGAN, et al.,
Plaintiffs-Appellants,

v.

On Appeal from the United States District Court for the Western District of Michigan

CITY OF NEWAYGO, et al.,
Defendants-Appellees.

Decided and Filed June 7, 1995

Before: MERRITT, Chief Judge; NELSON and DAUGHTREY, Circuit Judges.

MERRITT, C.J., delivered the opinion of the court, in which DAUGHTREY, J., joined. NELSON, J., delivered a separate dissenting opinion.

MERRITT, Chief Judge. This case is a constitutional challenge to a ballot access provision adopted by the City of Newaygo, Michigan. The provision prevents residents of the City who are delinquent on their local taxes or water and sewer fees

from appearing on the ballot in elections for local offices. Two of the plaintiffs in this case attempted to run for mayor and city council respectively in 1993. The town clerk found that at the filing deadline they had not paid their local taxes and refused to place their names on the ballot. The other two plaintiffs are registered voters in the City and now claim they were denied the opportunity to vote for the two candidates whose names were not placed on the ballot in 1993. All four plaintiffs now claim that the City ordinance which prohibits otherwise eligible candidates from appearing on the ballot if they have not paid their local taxes or water and sewer assessments violates their rights of freedom of association and Equal Protection under the First and Fourteenth Amendments to the United States Constitution.

The case raises two issues. First, we must determine whether this case is moot. The election has now long passed, and both potential candidates have now paid their delinquent taxes. Nonetheless, we find that this is a case "capable of repetition, yet evading review," and therefore appropriate for consideration on the merits. Second, when we turn to the merits of the case, we are faced with a less-than-clear line of Supreme Court precedent dealing with ballot access cases and a case from the Third Circuit holding a similar ordinance unconstitutional. The District Court refused to grant the preliminary injunction requested by the plaintiffs and entered a final judgment shortly thereafter. For the reasons set out below, we now affirm.

I. Facts

The four plaintiffs, Donald Corrigan, James Stroven, Michael Cook and Wayne Bumstead are qualified voters in the City of Newaygo, a home rule city with 1,484 residents. In May 1993, residents of the city, including Corrigan and Stroven, were involved in an attempt to recall the mayor, Thomas Kowalski. Kowalski resigned before a recall election could be held.

In May 1993, Cook submitted a petition to run for the office of mayor, and Bumstead submitted a petition to run for city council. Both men were former members of the city council and had been active in city politics for some time. The deadline for filing petitions to appear on the ballot was May 11. Both Cook and Bumstead met that deadline. On May 14, the City Clerk notified both men that they had outstanding obligations to the City, and therefore could not have their names placed on the ballot.[1] The Clerk based her determination on a section of the Newaygo City Charter that provides: "No person shall be eligible for any elective or appointive City office who is in default to the City." Newaygo City Charter § 5.4(b). Cook owed $372.63 in delinquent property taxes and $48.67 in water and sewer charges to the City. Bumstead owed $318.33 in past due property taxes to the City. Both Cook and Bumstead paid their obligations in full before the election, although because the filing deadline had passed they remained ineligible to

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[1]The Newaygo City Charter provides: Within three days after the last date for filing petitions, the Clerk shall make his final determinations as to the validity and sufficiency of each nominating petition and whether or not the candidate has the qualifications required for his respective elective City office by this Charter ... Newaygo City Charter § 4.10(b).

appear on the ballot. Thomas Kowalski, the mayor who had resigned under pressure, was the only candidate who appeared on the ballot for mayor.

Cook allegedly defaulted because he did not have sufficient funds to pay his taxes (which included an additional sum for state property taxes). He claims his water assessment was only eleven days overdue at the May 11 filing deadline. Bumstead asserts that he did not know that he had not paid the property taxes. The land on which the taxes were levied was under a land contract to his son that provided that his son would be responsible for paying the taxes. Bumstead states that he incorrectly assumed his son had paid the taxes, but admits that because he still held title to the property, he had the ultimate responsibility for paying the taxes.

II. Mootness

The City contends that we should not reach the merits of this claim because the case has become moot. It argues that the election has already taken place without either Cook or Bumstead on the ballot and therefore injunctive relief would not be possible. Furthermore, the City argues that both potential candidates have now paid their arrears so that there is no reason to expect that they will be excluded from any future elections.

As the Supreme Court has noted, in order to avoid mootness "[t]he usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe v. Wade*, 410 U.S. 113 (1973). Even when an actual controversy does not exist, an appellate court may appropriately adjudicate an issue when it is one that

is "capable of repetition, yet evading review." Id.; *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Moore v. Ogilvie*, 394 U.S. 814 (1969) (a case is not moot when it creates a "continuing controversy").

In *Blumstein*, the Court addressed the mootness of case in which the plaintiff had been denied the right to vote under a durational residency requirement. By the time the case reached the Supreme Court, the candidate had already fulfilled the requirement and thus would not be kept off the ballot again under the statute. Nonetheless, the Court held the case was not moot because "the laws in question remain on the books, and Blumstein has standing to challenge them as a member of the class of people affected by the presently written statute." *Blumstein*, 405 U.S. at 333 n. 2. The *Blumstein* Court reached this conclusion even though the case was brought by only one plaintiff and not as a class action. The rationale used in *Blumstein* resembles the reasoning used in *Roe* to hold that case "capable of repetition, yet evading review." The *Roe* Court observed both that a woman could be become pregnant more than once, and that "in the general population, if man is to survive, [pregnancy] will always be with us." *Roe*, 410 U.S. at 125. In other words, the Court held that the *Roe* plaintiff could represent the class of people who might become pregnant in the future and be subjected to the Texas statute restricting abortions.

This case is not moot with respect to the two voters, Corrigan and Stroven. We have every reason to expect that ordinance will be enforced again in a future election. Furthermore, the defendant's refusal to place Cook and Bumstead on the ballot, which denied Corrigan and Stroven the chance to vote for them, could not be fully litigated before the election had passed.

There is a reasonable expectation that future candidates for whom Corrigan and Stroven wish to vote will be denied a place on the ballot under the ordinance. Thus with respect to the voters, this case is capable of repetition, yet evading review.

In addition, with respect to the candidates this case resembles *Blumstein* very closely. Like the plaintiff in *Blumstein* who had fulfilled the durational residency requirement, Cook and Bumstead have now paid their taxes. But, the *Blumstein* plaintiff and the candidates in this case both have standing as members of the class of people who would be affected by the statutes in the future. To hold this case moot would require the absurd result that a court would never be able to rule on the Newaygo ordinance. No candidate barred from the ballot under the ordinance would ever be able to litigate fully a case in the time between the filing deadline in Newaygo and Election Day. Unless a candidate were willing to remain in default for several years, he could not demonstrate convincingly that the ordinance might ever be applied to him again. Therefore, the town could repeatedly apply the ordinance to different candidates, none of whom could ever challenge it in court.[2]

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[2]The dissent would have us hold this case moot based on the argument that there is no "reasonable expectation" that the statute might be enforced again. Clearly, those residents of the town who voted for the ordinance in the local referendum viewed the matter differently. If they believed that no candidates for local office would ever be tax-delinquents, and therefore that the ordinance would never be violated or enforced, there would have been no reason for them to enact it. Furthermore, we note that in the Third Circuit a very similar ordinance was enforced and gave rise to a lawsuit that resulted in another published appeals court opinion. *See Deibler v. City of Rehoboth Beach*, 790 F.2d 328 (3d Cir. 1986). It seems likely to us that

(continued...)

III. The Merits

The Supreme Court has made clear that a candidate does not have a fundamental right to appear on the ballot. *Bullock v. Carter*, 405 U.S. 134 (1972). Nonetheless, "[t]he impact of candidate eligibility requirements on voters implicates basic constitutional rights." *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Consequently, "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Bullock*, 405 U.S. at 143.

A. Freedom of Association

In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Supreme Court advised us that in general there are two types of freedom of association protected by the Constitution.[3] One type of freedom of association

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[2](...continued)
if these tax-delinquency ordinances have produced two such cases in nine years, this ordinance may well be enforced again in the near future. Finally, the dissent implies that prior to this case, the Newaygo ordinance was never invoked against any candidate in the twenty- five years since it was enacted. A more accurate statement would be that we do not know whether the ordinance has been invoked in the past because the record is silent on this issue.

[3]The Court held: Our decisions have referred to constitutionally protected "freedom of association" in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives
(continued...)

is related to privacy and is protected by the due process clause--for example the freedom of association on which we base family life and personal friendship--and the second type of freedom of association is a means to another more basic end such as free speech in the political marketplace, the right of voters to cast an informed vote or to form coalitions with other voters. Plaintiffs' claims here have nothing to do with the first type of freedom of association. No form of freedom of association connected to intimate, confidential or personal relationships is asserted.

The plaintiffs rely on the means-to-an-end form of freedom of association described in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). In Anderson the Court held: "It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues.... The exclusion of candidates [can burden] voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens." *Id.* at 787-88. In *Anderson*, the Court struck down as unconstitutional an early-filing deadline for independent candidates running for president because it effectively prevented those candidates from appearing on the ballot by placing

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[3](...continued)
protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment--speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties. *Jaycees*, 468 U.S. at 617-18.

additional burdens on them. The Court looked to the consequences of the early-filing deadline and found that voters would not be able to vote for candidates who were not nominees of the two major parties and therefore for candidates whose views differed from those advanced by the two major parties.

No such consequences flow from the ordinance in question here. The ordinance does not have the effect of preventing the expression of political views or the forming of groups for this purpose. A person who mistakenly overlooks paying, or cannot immediately pay, local property tax cannot claim to be part of an association or movement when, as here, none of the plaintiffs claim that the taxes were not paid because they were engaging in a tax protest against an unjust law. The tax-paying requirement is a means of collecting taxes, not a means of restricting political speech or the right to vote.

Consequently, the only potential associational interests at stake here would be those of residents who mistakenly failed to pay their taxes or water and sewer assessment, or of those who were unable to do so. (Although Cook claims that he could not pay his taxes because he did not have sufficient funds, he does not claim that the tax rates are too high. Therefore, under a freedom of association analysis, his claim does not differ from someone who mistakenly failed to pay their taxes.) None of the plaintiffs contend that the voters had any particular interest or desire to vote for candidates who failed to pay their taxes because of inability or inadvertence, or even that such candidates represent any particular political viewpoint.

Instead, the plaintiffs argue they form an association based on their opposition to Mayor Kowalski. But the ordinance is not directed at candidates who oppose Mayor Kowalski. If candidates who have failed to pay their taxes inadvertently are also those who oppose Mayor Kowalski, the relationship is purely incidental. We find no reason to believe that the ordinance in question burdens those who oppose Mayor Kowalski, either on its face or in effect. Consequently, we hold that the plaintiffs have asserted no associational interests that would be protected as fundamental rights under the Constitution.

B. Equal Protection Violation Against Those Unable to Pay

Next we consider whether the ordinance denies the plaintiffs' Equal Protection rights. The plaintiffs assert an Equal Protection violation here with respect to Cook, who alleged that he could not afford to pay taxes or water and sewer assessment when they were due. The Supreme Court has struck down excessive filing-fee requirements as violating the Equal Protection clause because of "the obvious likelihood that [the] limitation would fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs required ..." *Bullock*, 405 U.S. at 144. See also *Lubin v. Panish*, 415 U.S. 709 (1974). Likewise, the Court has found property ownership requirements unconstitutional as a bar to ballot access. See *Quinn v. Millsap*, 491 U.S. 95 (1989); *Turner v. Fouche*, 396 U.S. 346 (1970). It is unclear, however, what standard of review the Supreme Court would require us to use to evaluate statutes that may discriminate on the basis of wealth. Compare *Bullock*, 405 U.S at 144 (holding that statute did not meet rational basis review and therefore

no need to consider higher standard of review) with *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28-29 (1973) (rejecting claim that plaintiffs in that case constituted a definable class but not ruling out possibility that poverty could constitute suspect classification in some instances therefore requiring strict scrutiny review). Nevertheless, we do not have to decide the proper standard of review because this ordinance does not burden the rights of a class entitled to protection under any standard of review.

The ordinance here does not preclude a protected class of people from seeking office. The duty of paying taxes and water and sewer assessments is undertaken when a resident chooses to own property. This ordinance does not affect those who may not have sufficient wealth to own property. Nor does the ordinance disproportionately exclude any other group based on a suspect classification. Property owners who are unable to meet the civic obligations they have voluntarily assumed are not a suspect class. Thus, the plaintiffs have asserted no fundamental interests that would entitle them to protection as a suspect class under the Equal Protection Clause.

C. Equal Protection Violation as an Arbitrary Ordinance

The plaintiffs do have a right not to be excluded arbitrarily by the town from appearing on the ballot. This basic protection under the Equal Protection Clause requires the City to provide a rational basis for the restrictions it applies. If the City's restriction "rests on grounds wholly irrelevant to the achievement of a valid state objective" then the ordinance must be struck down under "rationality review." *Turner*, 396 U.S. at 362. *See*

also Quinn, 491 U.S. at 107 n. 10. This is true even when the plaintiffs cannot assert any other independent fundamental interest.

In *Deibler v. City of Rehoboth Beach*, 790 F.2d 328, 335-36 (3d Cir. 1986), the Third Circuit had before it a similar local ordinance prohibiting a delinquent taxpayer access to the ballot as a candidate. Plaintiff, who had founded a local tax protest group, was denied access because he was a delinquent taxpayer. After upholding the ordinance on the freedom of association grounds, the Third Circuit, in a divided decision, struck the ordinance on Equal Protection grounds as irrational and arbitrary. The court held that the reasons given by the city as the basis for the ordinance-- screening out candidates who would harm "public respect for city government" and those who lack "the necessary commitment to the well-being" of the community--are not "rationally served" by the ordinance. The court said that delinquent taxpayers may be just as upright in "commitment" and just as able to inspire "respect" for the local government as others.

In this case, the City has put forward the same "commitment" and "public respect" justifications asserted in *Deibler*, as well as one other: that the ordinance protects the integrity of the City's decision-making process with respect to taxation. It argues that candidates who are delinquent in their taxes cannot be trusted to make responsible tax policy decisions. Whatever may be said about the "commitment," "public respect," and "integrity of the decision making process" arguments put forward by the City, this ordinance does serve the economic purpose of enforcing the City's tax regime. It provides incentives to those citizens who wish to run for office to pay their taxes. Furthermore, it

punishes those who do not fulfill their obligations to the City by not allowing them to run for public office in Newaygo. In *United States v. Lee*, 455 U.S. 252 (1982), the Supreme Court held that government entities have a significant interest in administering the tax system. Lee was an Amish farmer and carpenter who claimed that paying social security taxes and receiving social security benefits violated his religion. Therefore, he argued that he should be exempt from paying social security taxes under the Free Exercise Clause. The Supreme Court rejected this argument holding that "the tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious beliefs. Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax." *Id.* at 260 (citations omitted). Consequently, the Court ruled that ensuring the functioning of the tax system was, in that case, "essential to accomplish an overriding governmental interest." *Id.* at 257-58.

In this case, the City's interest in encouraging its citizens to pay taxes through a ballot access restriction must survive "rational basis" review, a much lower standard than the "fundamental right" analysis that the Free Exercise Clause claim requires. It is true that invalidation of the law in *Lee* would provide a much larger group with an incentive to refuse to pay taxes on religious grounds than would invalidation of this ballot access law. But both laws are rationally related to the administration of the tax system. Hence, the ordinance is not an arbitrary restriction, and the plaintiffs' Equal Protection rights have not been violated.

Although we conclude that the ordinance has a rational basis, we do not necessarily disagree with the Third Circuit that the ordinance is not well-tailored to accomplish the other objectives the defendant claims it does. A candidate who may have been delinquent in his taxes or assessments for years can pay his obligations the day before the filing deadline. It is not clear that this person is more suited for office under the City's other justifications for the ordinance than someone who pays one day after the filing deadline. In addition, the City's rationales for the ordinance do not account for those who might be unable to pay their taxes. It is not clear that such a person would lack commitment to the City, fail to engender public respect, or be unfit to fashion the City's tax policies. In light of the existence of one "rational basis" for the ordinance, we need not decide whether these three moral justifications for the ballot access restriction can survive rational basis review.

D. Ballot Access Weighing

The Supreme Court has stated that a single balancing test should be used in ballot access cases to evaluate freedom of association, equal protection and due process interests: [A] court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after

weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. *Anderson*, 460 U.S. at 789. *See also Burdick v. Takushi*, 504 U.S. 428 (1992). It is unclear whether this means that there is a ballot access potpourri of interests that potentially includes all of the numerous interests protected by the concepts of freedom of association, equal opportunity and privacy, and that all together they should be listed and weighed to see if there is a combination that violates the Due Process, Equal Protection and Free Speech clauses read together. We have sought to view the matter in this way and do not find any interests we have not taken into account in our separate analyses under "freedom of association" and "Equal Protection."

Because the plaintiffs have not enunciated any affirmative rights of association or Equal Protection that they have been denied, and because we find that the ordinance is not completely arbitrary under rational basis review, the plaintiffs have not been deprived of any rights. Because the defendant does have a minimal interest in tax enforcement at stake in this case, when we balance these interests under *Anderson*, the defendant prevails. Accordingly, the judgment of the District Court is AFFIRMED.

DAVID A. NELSON, Circuit Judge, dissenting.

If I thought we had jurisdiction to decide the merits of this appeal, I would agree with the conclusion that the challenged charter provision is constitutional. I am not persuaded, however, that jurisdiction exists.

This question turns, as the court's opinion recognizes, on the applicability of the "capable of

repetition, yet evading review" doctrine. The doctrine requires more than a theoretical possibility that there will be a repetition of the complaining party's grievance; the plaintiff must show a "reasonable expectation" that he or she (or members of the class he or she represents) will be subjected to the challenged action again. *See Weinstein v. Bradford*, 423 U.S. 147, 149 (1975); *Dean v. Austin*, 602 F.2d 121, 123 (6th Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980); and *Speer v. City of Oregon*, 847 F.2d 310, 311 (6th Cir. 1988), all of which refer to the "reasonable expectation" requirement. *See also Sosna v. Iowa*, 419 U.S. 393, 400 (1975), where the Court stressed that "it is clear that [Iowa] will enforce [its durational residency requirement for plaintiffs in divorce actions] against those persons in the class that appellant sought to represent and that the District Court certified." (Emphasis supplied.)

As far as the two candidates in the case at bar are concerned, the record does not show that either of them is likely to be unwilling or unable to pay his taxes while running for office in the future. We cannot simply assume that having defaulted once, they are likely to default again. *See Honig v. Doe*, 484 U.S. 305, 320 (1988), pointing out that the Supreme Court has generally "been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of [a governmentally inflicted] injury."

As far as the plaintiff voters are concerned, the record does not suggest that the charter provision is likely in future to deprive them of the chance to vote for anyone else they might be inclined to support. The charter provision was in effect for a quarter of a century before it was invoked to keep Messrs. Cook and

Bumstead from running for office. It does not appear that anyone who was delinquent in paying his taxes had ever been tempted to enter an electoral race in the City of Newaygo prior to the year in which Cook and Bumstead did so, and I know of nothing in the record to indicate that there is a reasonable expectation that anyone in this situation will be so tempted again. In most places, at least, a candidate's nonpayment of taxes, if made public, is something that could cost him or her votes--and candidates generally find it prudent to avoid alienating potential voters unnecessarily.

Durational residency requirements are different. Ours is a highly mobile society, and there was clearly a reasonable probability that the durational residency requirement involved in *Sosna v. Iowa* would actually keep some people from getting divorced in future years, just as it was clear that the durational residency requirement involved in *Dunn v. Blumstein*, 405 U.S. 330 (1972), would actually keep some people from voting in future years. The chances are far more remote that future candidates will wish to run for office in Newaygo while in default to the city.[1] It is neither necessary nor

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[1]Notwithstanding that Newaygo has fewer than 1500 inhabitants, I agree with my colleagues on the panel that there could again come a time when some Newaygoan might wish to run for office while in default on his taxes. But the fact that something of the same sort happened 14 years ago in a resort town in Delaware (see the case cited in footnote 2 of the court's opinion) does not persuade me that Newaygo is at all likely to experience a recurrence of this particular problem. Although it is true that there would have been no reason for the voters of Newaygo to adopt the ballot access provision in the first place if they had not recognized the possibility that tax delinquents might wish to run for office, I do not think it necessarily follows that the voters had a "reasonable expectation" that this situation would

(continued...)

appropriate for us to rule on the Newaygo ordinance if the ordinance is not reasonably likely to trip up candidates in the future--and, as far as I can see, the ordinance is not in fact likely to do so. I would dismiss the appeal for want of jurisdiction.

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[1](...continued)
actually arise. There are plenty of small towns with election ordinances that have never had to be enforced at all, much less enforced in more than one election season, because no one has ever felt inclined to violate them.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DONALD CORRIGAN; JAMES STROVEN; MICHAEL COOK; and WAYNE BUMSTEAD,

Plaintiffs,

File No. 1:93-CV-582

v.

Hon. Robert Holmes Bell

THE CITY OF NEWAYGO; and CHARLENE A. CORRIGAN, in her official capacity as City Clerk for the City of Newaygo

Defendants.

Filed September 24, 1993

OPINION

On July 29, 1993, Plaintiffs filed this action against the City of Newaygo and the Newaygo City Clerk alleging violations of the first and fourteenth amendments and seeking declaratory and injunctive relief. Plaintiffs challenge the City's disqualification of two candidates for city office based upon their outstanding tax and water/sewer liabilities to the City.

This matter is before the Court on Plaintiffs' motion for preliminary injunction. Plaintiffs request this Court to issue a preliminary injunction ordering the Defendants to add the names of Michael Cook and Wayne Bumstead to the City ballot for the general election to be held in November 1993 as candidates for mayor and city council.

I.

A hearing was held on August 31, 1993. At the hearing the parties stipulated that four purposes of this motion only Defendant's affirmative defenses would not be raised and that the following facts were not in dispute:

Plaintiffs Donald Corrigan, James Stroven, Michael Cook and Wayne Bumstead are qualified voters in the City of Newaygo. In May 1993, residents of the City, including Plaintiffs Corrigan and Stroven, were involved in a effort to recall the former Mayor, Thomas Kowalski. Thomas Kowalski resigned before a recall election was held.

In May 1993, Plaintiff Cook submitted a petition for the Officer of Mayor and Plaintiff Bumstead submitted a petition for a position on the city council. At the time they submitted their petitions both Cook and Bumstead had outstanding obligations to the City. Cook owed property taxes on a water assessment, and Bumstead owed property taxes on property that his land contract vendee failed to pay.

Plaintiffs Cook and Bumstead were notified by Defendant Corrigan, the city Clerk, that their petitions were rejected on the basis of Section 5.4(b) of the City

Charter which provides that "[n]o personal shall be eligible for any elective or appointive city office who is in default to the city . . . ." The non-payment of taxes and/or assessments was the only basis for their disqualification. The petitions were valid in all other respects. The outstanding taxes and/or assessments have now been paid.

Bumstead and Cook both have a history of active involvement with the City of Newaygo. Bumstead was on the City Council for 11 years and was a member of the Planning Commission. Cook was a paid volunteer for the fire board and was a member of the City council in 1991-92.

If the Court were to grant Plaintiffs' motion for preliminary injunction by September 28, 1993, there would be sufficient time to have their names placed on the ballot, and adding their names to the ballot would not necessitate a primary election.

II.

In deciding a motion for preliminary injunction, this Court must consider the following four factors:

(1) whether the moving party has a substantial probability of success on the merits;
(2) whether irreparable injury will occur if the inunction is not issued;
(3) whether the injunction will have a harmful effect on third parties; and
(4) whether the public interest would be served by the injunction.

CSX Transp., Inc. v. Tennessee State Bd. of Equalization, 964 F.2d 548, 550-51 (6th Cir. 1992) (citations omitted). In addition, an injunction generally should not issue if there is an adequate remedy at law. *Id.* The four considerations are factors to be balanced, and not prerequisites that must be met. *Frisch's Restaurant, Inc. v. Shoney's Inc.*, 759 F.2d 1261, 1263 (6th Cir. 1985).

III.

Plaintiffs contend that the application of the charter in this case violates both the federal constitution and state law. As a general rule, a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available. *Hagans v. Layine*, 415 U.S 528, 547 (1974). Accordingly, this Court runs first to the state law argument.

At the outset, it is important to identify what is not at issue in this case. There is no dispute that § 5.4 of the City Charter provides in pertinent part that "No person shall be eligible for any elective or appointive city office who is in default of the city . . . ." There is no dispute that Cook and Bumstead owed taxes and/or assessments to the city when their petitions were filed. There is no evidence or allegation that Plaintiffs were denied access to the ballot in retaliation for their attempt to recall the mayor or because of any other political animus.

The City of Newaygo is a home rule city. Under the Home Rule Cities Act, cities such as Newaygo must provide in their charter "for the qualifications, duties and compensation of the city's officers." MCLA § 117.3(d); MSA § 5.2073(d). The Act also provides that cities do not have power "[t]o make a contract with, or give an

official position to, one who is in default to the city." MCL § 117.5(f); MSA § 5.2084. Consistent with this state law provision, Newaygo adopted § 5.4 of the City Charter which provides in pertinent part that "No person shall be eligible for any elective or appointive city office who is in default to the city . . . ."

Plaintiffs contend that Defendants improperly construed the term "default" under the City Charter (and impliedly under state law as well), to apply to the failure to pay property taxes or assessment They contend that under state law, the phrase "in default to the city" implies more than a civil debt or liability. They cite a 1935 Attorney General opinion for the proposition that before a candidate may be disqualified under a default provision, there must be a willful omission to account or pay over funds belonging to the city with a corrupt intention. *See* OAG 935-936 No. 129 (October 29, 1935). Plaintiffs also cite a letter from the Attorney General dated September 26, 1974, which stated that the 1935 opinion had not been overruled and that any charter provision excluding one from office who is in default to the city should be interpreted in accord with that opinion.

The court declines to apply the Attorney General opinion to this case for two independent reasons. First, the 1935 Attorney General opinion was written in response to a query about how to construe a charter default provision where the charter did not define "default." In contrast to the charter reviewed by the Attorney General, the Newaygo City Charter, which was adopted in 1968, explicitly defines "default" in section 2.2(1) to include "being delinquent in taxes." Nothing in the Home Rule Cities Act precludes a home rule city

from defining the term, or from adopting stricter qualifications than are required under the Act.

In this case, because the city charter has unambiguously defined the term "default", there is no need to look to the Attorney General opinion for assistance in construing the term.

Second, the Court does not find the Attorney General opinion to be persuasive. Attorney General opinions do not have the force of law are not binding on Michigan courts. *Frey v. Department of Management & Budget*, 429 Mich. 315, 338, 414 N.W.2d 873 (1987); *Traverse City School Dist. v. Attorney General*, 384 Mich. 390, 42, 85 N.W.2d 9 (1971). In this case the Court believes that the Attorney General opinion contains a strained interpretation of clear legislative language.

The Michigan legislature has not defined "default" as that term is used in the Home Rule Cities Act. Under Michigan law, words in a statute are to be interpreted according to their commonly accepted meanings. *Production Credit Assoc. v. Michigan Department of Treasury*, 404 Mich. 301, 312 (1978). Default is most commonly defined and understood as a failure to do something required by duty or law. *See, e.g.*, Black's Law Dictionary (5th ed. 1979); Websters Third New International Dictionary (1986). Although the term also embraces the idea of dishonesty and of wrongful act, this is not the ordinary or common meaning of the term.

The Court is satisfied that the City's interpretation of the "default" language in the City Charter is consistent with the Home Rule Act and does not violate state law.

IV.

Having found no likelihood on the merits of Plaintiffs' state law claim, the Court turns to an examination of the whether the charter as applied in this case violates the constitution.

While the right to vote is a fundamental right, candidacy is not. *Bullock v. Carter*, 405 U.S. 134, 142-43 (1972). Nevertheless, "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Id.* at 143.

Plaintiffs contend that such a convergence of interests is at issue here. They have alleged that Defendant's refusal to place the names of Cook and Bumstead on the ballot violates both the voter-plaintiffs' right to vote for the candidate of their choice and the candidate-plaintiffs' right to run for elective office in violation of the First and Fourteenth Amendments to the Constitution.

In examining ballot access cases, courts generally follow either a First and Fourteenth Amendment analysis or an Equal Protection analysis. *Anderson v. Celebrezze*, 460 U.S. 780, 786 n. 7 (1983) (citing cases). The analysis under these two lines of cases often converges, however, since the Equal Protection line of cases apply the "fundamental rights" strand of equal protection analysis and generally identify the First and Fourteenth Amendment rights implicated by restrictions on the eligibility of voters and consider the degree to which the State's restrictions further legitimate state interests. *Id.* *See also, Clements v. Fashing*, 457 U.S. 957, 971 (1982) (equal protection analysis disposes of first amendment argument).

In *Clements*, 457 U.S. at 972, a majority of the Court held that provisions under the Texas constitution that limit a public official's ability to become a candidate for another public office do not violate the Equal Protection Clause or the First Amendment. Only a plurality agreed on application of the rational basis test to the Equal Protection analysis.

In *Anderson*, the Court was presented with a challenged to Ohio's March filing deadline for independent candidates. The Court, citing Equal Protection cases, but basing its decision on the First and Fourteenth Amendments, determined that the burdens on the voters' freedom of choice and freedom of association, outweighed the State's minimal interest in a March filing deadline. 460 U.S. at 806.

What has emerged in the area of ballot access cases is a balancing test that does not clearly distinguish between due process, equal protection, or first amendment analysis. *See* 3 Rotunda & Nowak, *Treatise on Constitutional Law* 2nd § 18.32, p. 413 (1992). Courts are required to balance the degree to which regulation impairs first and fourteenth amendment rights against the degree to which the regulation advances important state interests. *Id.*

There is no "litmus-paper test" to separate valid from invalid restrictions. *Storer v. Brown*, 415 U.S. 724, 730 (1974). Instead, constitutional challenges to candidate eligibility restrictions must be resolved on a case-by-case basis.

[The Court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the

plaintiff seeks to vindicate. It then must identify and evaluate the precise interest put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson, 460 U.S. at 789. *See also Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986).

Any election law will invariably affect, at least to some degree, the individual's right to vote and his right to associate with others for political ends. *Anderson*, 460 U.S. at 788. Nevertheless, the Supreme Court has upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself. *Id.* At 788 n. 9 (citing cases).

Recently, in *Burdick v. Takushi*, 119 L.Ed.2d 245, 253; 112 S.Ct. 2059 (U.S. 1992), the Supreme Court reaffirmed its adherence to the flexible standard articulated in *Anderson*. "Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Id.*

[W]hen those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." But when a state election law provision imposes only

"reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.

Id. at 253-54 (citations omitted).

Applying this standard to Hawaii's prohibition on write-in ballots, the Court found that because Hawaii provides easy access to the ballot until the cutoff date for the filing of nominating petitions two months before the primary, any burden imposed by the prohibition was a very limited one. *Id.* at 257. The Court found that the legitimate interests asserted by the State, its interest in avoiding the unrestrained factionalism at the general election and its interest in guarding against party raiding, were sufficient to outweigh petitioner's limited interest in waiting until the eleventh hour to choose his preferred candidate. *Id.*

This Court's first inquiry under the *Anderson* test concerns the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate.

Plaintiffs describe the injury as a denial of the right to vote for the candidate of their choice. Brief in Support of Motion for Preliminary Injunction, p. 4. They have also alleged that "Plaintiffs Corrigan, Stroven and other voters, who have already expressed their dissatisfaction with the present city administration through their recall petition, can effectively assert their preference only if competing candidates are allowed access to the ballot." Brief in Support of Motion for Preliminary Injunction, p. 8.

The Court finds the magnitude of the injury asserted in this case to be minimal. The Supreme Court has recognized that the right of individuals to associate for the advancement of political beliefs and the right of qualified voters to cast their votes effectively are fundamental rights. *Anderson*, 460 U.S. at 787 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968)). Nevertheless, "not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates." *Anderson*, 460 U.S. at 788.

In *Anderson* the Court found that the Ohio early filing deadline placed "a particular burden on an identifiable segment of Ohio's independent-minded voters." 460 U.S. at 792. The Court held that "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status." *Anderson*, 460 U.S. at 792-93.

In contrast to the situation in *Anderson*, the default provision at issue in this case does not place a burden on a particular segment of the community. It applies to incumbent and competing candidates alike. It applies to majority and minority candidates. It does not restrict candidates on the basis of the content of their speech or their political agenda.

Cook and Bumstead were not disqualified because they were competing candidates or because they were associated with the recall of the former mayor. Plaintiffs freely admitted at oral argument that Cook and Bumstead were disqualified only because they were in

default to the City. They conceded that they are not asserting any kind of animus on the part of the Defendants.

Plaintiffs rely in large part on *Deibler v. City of Rehoboth Beach*, 790 F.2d 328 (3rd Cir. 1986), where the court held that a city charter provision requiring that a candidate for commissioner be a nondelinquent taxpayer of the City was not rationally related to any legitimate governmental interest and violated the equal protection clause of the Fourteenth Amendment.

Associational interests played an important part in the *Deibler* decision. Deibler's name was excluded from the ballot under a similar default provision because he owed $264 in property taxes. Deibler, however, was a member of the Rehoboth Concerned Taxpayers Association, and paid certain tax obligations into an escrow account to persuade the city to change its tax policies. *Id.* At 332.

Unlike Deibler, Cook and Bumstead's non-payment of taxes was not part and parcel of their political expression. Overall, the default provision in this case has minimal impact on the Plaintiffs' fundamental right to associate for the advancement of their political beliefs.

Ballot restrictions have also been more closely scrutinized when they discriminate among candidates or voters on the basis of wealth or poverty. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966) (poll tax); *Turner v. Fouche*, 396 U.S. 346, 362-63 (1970) (freeholder requirement).

In *Bullock*, the Supreme Court struck down a Texas statute that required a sizeable filing fee because it contributed to a disparity in voting power based upon wealth. 405 U.S. at 144. The Court did not hold that all filing fees were suspect. It was the very size of fees imposed under the Texas system that gave it a patently exclusionary character, and differentiated the Texas requirement from those filing-fee requirements that most candidates could be expected to fulfill from their own resources or at least through modest contributions. *Id.* at 143.

The City of Newaygo's non-default requirement is not a classification based upon wealth. It does not fall with unequal weight on voters due to their economic status. There is no showing that this provision would have any substantial tendency to limit the pool of candidates from which voters may choose.

The non-delinquency requirement does not impose any additional obligation that candidates do not already have as citizens. It merely requires candidates to meet their voluntarily assumed obligations to pay property taxes and other city assessment. The candidates are not required to satisfy a discriminatory exaction to be on the ballot, but only to pay what they, and every other citizen similarly situated, owe as taxes. *See Deibler*, 790 F.2d at 342 (Weis, J., dissenting).

Balanced against the minimal injuries asserted by Plaintiffs are the interests asserted by the City. The City has articulated several governmental concerns which are logically furthered by the default provision. The City has an interest in reasonably assuring that candidates for the city's public offices have at least a minimal level of commitment to the City and its government. Such a

commitment may be shown, in part, through the payment of those voluntarily assumed obligations which constitute a significant part of the City's revenues. The City also has an interest in assuring that the general public's respect for City government and its functions is maintained. Finally, the City has articulated an interest in protecting the integrity of the decision-making process itself. Since the City's elected officials are involved in deciding issues relating to taxation and collection of assessments, the integrity of the City government could be compromised if those who make and enforce the assessments are not held to those minimal obligations.

Plaintiffs contend that these asserted interests are not necessary in this case. They have demonstrated their commitment to the city in the past. Moreover, because their taxes are now paid, it can no longer be argued that their candidacy will compromise the integrity of the City government.

Plaintiffs' argument essentially requests that the law be more narrowly tailored to apply to their specific situations. As noted in *Burdick*, invocation of rigid narrow tailoring requirements in essence invokes application of strict scrutiny standards, which are not required here. 119 L.Ed.2d at 258 n. 10.

There is no constitutional guarantee that voters will always have the candidate of their choice on the ballot. It appearing that the non-default provision imposes only minimal, reasonable, and nondiscriminatory restrictions on Plaintiffs' rights, and that the restrictions further important regulatory interests of the City, the Court concludes that Plaintiffs have failed to show a likelihood of success on the merits of their constitutional claim.

Of course, the Court's conclusion that Plaintiffs have failed to meet their burden of demonstrating a likelihood of success on the merits does not end the Court's analysis. Even where there is no substantial likelihood of success on the merits a court is not precluded from issuing a preliminary injunction if the movant at least shows a serious question going to the merits and irreparable harm which "decidedly outweighs" any potential harm to the defendant if an injunction is issued. *Frisch's*, 759 F.2d at 1270.

In this case Plaintiffs have not shown either a serious question going to the merits or irreparable harm which decidedly outweighs the people of the City of Newaygo's interest in the evenhanded application of their duly adopted Charter provisions governing candidate requirements.

The Court is not convinced that Plaintiffs have met their burden of showing their entitlement to a preliminary injunction. Accordingly, Plaintiffs' motion for preliminary injunction will be denied.

It appears to the Court that the decision on this motion may be dispositive of this case. If any of the parties believe that there are remaining issues for determination, they should notify the Court within 30 days of this opinion and the matter will be scheduled for a Rule 16 scheduling conference.

Date: September 24, 1993

/s/
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DONALD CORRIGAN; JAMES STROVEN; MICHAEL COOK; and WAYNE BUMSTEAD,

Plaintiffs,

File No. 1:93-CV-582

v.

Hon. Robert Holmes Bell

THE CITY OF NEWAYGO; and CHARLENE A. CORRIGAN, in her official capacity as City Clerk for the City of Newaygo

Defendants.

Filed September 24, 1993

ORDER

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that Plaintiffs' motion for preliminary injunctive relief (Docket # 3) is DENIED.

If any of the parties believe that there are remaining issue for determination, they should notify the Court within 30 days of this opinion and the matter will be scheduled for a Rule 16 scheduling conference.

IT IS SO ORDERED.

Date: September 24, 1993

/s/
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

95-363

No.

Supreme Court, U.S.
FILED
OCT 6 1995
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

DONALD CORRIGAN, JAMES STROVEN,
MICHAEL COOK, and WAYNE BUMSTEAD,

Petitioners

vs.

THE CITY OF NEWAYGO and CHARLENE A. CORRIGAN,
in her official capacity as City Clerk for the
City of Newaygo,

Respondents

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RESPONDENTS, THE CITY OF NEWAYGO AND CHARLENE CORRIGAN'S, BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. **Whether a voter approved city charter provision disqualifying candidates for public office who have outstanding water, sewer or tax bills violates the Equal Protection Clause.**

II. **Whether a voter approved city charter provision disqualifying candidates for public office who have outstanding water, sewer or tax bills violates the First Amendment associational rights of disqualified candidates and their supporters.**

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Deibler v. City of Rehoboth Beach, 790 F.2d 328 (3rd Cir. 1986) 1-3,9

STATEMENT OF THE CASE

For purposes of this petition, Respondents accept Petitioners' Statement of the Case as a description of this dispute's pertinent facts. Respondents agree that the Sixth Circuit Court of Appeals discussed the Third Circuit Court of Appeals case Deibler v. City of Rehoboth Beach, 790 F.2d 328 (3rd Cir. 1986), but reject Petitioners' contention that the Sixth Circuit decided this case on grounds similar to those upon which the Third Circuit decided Deibler. Respondents also note that the voters approved the provisions of the Newaygo City Charter.

ARGUMENT

In support of their request for review, Petitioners contend that the Sixth Circuit Court of Appeals' decision in Corrigan v. City of Newaygo, 55 F.3d 211 (6th Cir. 1995), upholding the constitutionality of the Newaygo City Charter's default provision, conflicts with the Third Circuit Court of Appeals' conclusion in Deibler v. City of Rehoboth Beach, 790 F.2d 328 (3rd Cir. 1986). However, the Sixth Circuit and Third Circuit reach their results based on different grounds. The Sixth Circuit accepts tax code enforcement, a rationale which the Third Circuit does not evaluate in Deibler, as a rational basis for the Newaygo City Charter's default provision. Nor does a substantial question of law present itself to this Court. Petitioners' contention that the Sixth Circuit erred in concluding that tax code enforcement constitutes a rational basis for the Newaygo City Charter and that the Newaygo City Charter does not violate Petitioners' right of free association, is without merit. The Court should deny this Petition.

I. The Sixth Circuit's Determination In Corrigan That Tax Code Enforcement Constitutes A Rational Basis For The Newaygo City Charter's Default Provision Does Not Conflict With The Third Circuit's Decision In Deibler.

The Third Circuit concludes in Deibler that neither lack of the "necessary commitment" to a municipality's well-being nor endangerment

of "public respect for city government" comprises sufficient justification for a default provision based upon tax delinquency in a city charter. Deibler, 790 F.2d at 334-336 (3rd Cir. 1986). While explaining that tax code enforcement alone supplies a rational basis for the default provision in Newaygo's City Charter, the Sixth Circuit states that it does not necessarily disagree with the Third Circuit's decision in Deibler.

> Although we conclude that the ordinance has a rational basis, we do not necessarily disagree with the Third Circuit that the ordinance is not well-tailored to accomplish the other objectives the defendant claims it does.... In light of the existence of one "rational basis" for the ordinance, we need not decide whether these three moral justifications for the ballot access restriction can survive rational basis review.

Corrigan, 55 F.3d at 1217 (6th Cir. 1995). The Corrigan Court does not contradict Deibler.

Relying on the additional basis that tax code enforcement provides sufficient grounds for the Newaygo City Charter default provision, the Sixth Circuit specifically declines to address the "moral justifications" at the core of the Third Circuit's decision in Deibler. Corrigan, 55 F.3d at 1217 (6th Cir. 1995). Petitioners correctly state that the Sixth Circuit "upheld a ballot access restriction functionally identical to the one struck down in Deibler" and that the Sixth Circuit "rejected the result in Deibler," but this creates no conflict between the Third and Sixth Circuits. The Sixth Circuit

cannot reject the Third Circuit's reasoning because the Sixth Circuit does not examine the merit of "moral justifications." The Corrigan opinion indicates that even if the Sixth Circuit had addressed these issues, it would have been sympathetic to the Third Circuit's viewpoint as expressed in Deibler. Contrary to Petitioner's contention, Corrigan engenders no conflict between the Third and Sixth Circuits, but comprises an independent review of a distinct issue.

It is also clear that the facts of Corrigan are distinct from those of Deibler because Mr. Deibler was in default consistent with his participation in a tax protest group. The District Court opinion notes that associational interests played an important role in Deibler, as Mr. Deibler's tax delinquency directly related to his participation in the political process. Corrigan v. City of Newaygo, No. 93-CV-582 12 (W.D. Mich. 1993). This case contains no such associational overtone as Petitioners' tax deliquency stemmed from neglect rather than political expression or poverty.

II. The Sixth Circuit Correctly Concludes That Tax Code Enforcement Constitutes A Rational Basis For The Newaygo City Charter's Default Provision.

According to Petitioners, the Sixth Circuit improperly concludes that the Newaygo City Charter's default provision rationally relates to the City of Newaygo's interest in tax code enforcment. The City of Newaygo

has a significant interest in administering the tax system and Petitioners admit that nobody can seriously challenge this contention. See United States v. Lee, 455 U.S. 252, 102 S.Ct 1051, 71 L.Ed.2d 127 (1982). Under Petitioners' analysis, the Sixth Circuit errs for two "fundamental reasons."

First, Petitioners state that "the Sixth Circuit's holding that the default provision is an 'incentive' to citizens to pay their taxes rests on the false assumption that a potential candidate would be current in his or her taxes but for the lack of such an incentive." The Sixth Circuit's holding rests on no such assumption. The Newaygo City Charter provides incentive, but does not insure success. Providing an inducement to act rather than a guarantee of action, Newaygo's City Charter need not insure that every tax delinquent be current in his or her obligations to the city, but only provide pressure in that direction.

Petitioners note that if a tax delinquent person lacks funds to pay, the default provision cannot aid the City of Newaygo in collecting these taxes. The Newaygo City Charter's default provision provides an inducement for residents, such as Mr. Cook, to avoid voluntarily assumed property tax obligations as well as water and sewer charges if they cannot pay. That this incentive did not induce Mr. Cook to prioritize in such a manner that he could timely pay his voluntarily assumed obligations to the City of Newaygo, does not make the Newaygo City Charter irrational.

Stating that clerical errors or lack of knowledge might improperly deny access to the ballot, Petitioners' argument again fails to distinguish between cure and prevention. The Newaygo City Charter provides Mr. Bumstead with an incentive to carefully address clerical matters, fully understand his tax obligations, and responsibly pay his tax liability. That this inducement did not actually motivate Mr. Bumstead to responsibly comply with the tax code does not make the Newaygo City Charter irrational. If so, every law would be irrational simply because it fails to achieve the legislature's intended behavior in every instance.

The Newaygo City Charter's default provision rationally relates to enforcing the tax code because it seeks to prevent tax delinquency, rather than cure it as Petitioners suggest is necessary. Though not dependent on its ability to cure tax delinquency for its rational basis, the default provision has precipitated immediate payment from several of the Petitioners. Unlike situations where a party is unable to meet the requirements of a default provision, Petitioners could pay but were originally unwilling to responsibly meet tax requirements. That Petitioners ignored voluntarily assumed responsibilities until it was too late to cure the consequences, does not make the default provision an irrational means of tax code enforcement.

Petitioners contend that Newaygo's City Charter contains a second "major flaw" because the default provision does not relate to qualifications

for city office. This contention is also without merit. The Sixth Circuit concludes that the City of Newaygo's restriction is rationally related to enforcment of the tax code. To have legitimacy, the Newaygo City Charter need only have a single rational basis. Petitioners' brief concedes that collecting taxes is a rational basis for governmental action. It is not necessary that the City of Newaygo direct its City Charter at improving the qualifications of candidates for city office. It is sufficient that the Newaygo City Charter enforce the tax system.

The Newaygo City Charter's default provision provides incentive for residents to fulfill their voluntarily assumed financial obligations to the City of Newaygo. Contrary to Petitioners' contention, the default provision's legitimacy rests neither upon its success as an inducement nor its contribution to producing quality candidates for city office, but upon the fact that it promotes the genuine governmental interest of enforcing the tax code. The Sixth Circuit properly concludes that the Newaygo City Charter default provision has a sufficient rational basis.

III. The Sixth Circuit Correctly Concludes That The Newaygo City Charter, By Disqualifying Delinquent Tax Debtors From Candidacy For City Office, Does Not Violate Petitioners' First Amendment Right To Free Association.

Petitioners claim to have associated based upon their opposition to Mayor Kowalski. In light of this alleged association, Petitioners argue that

the Sixth Circuit errs by concluding that the Newaygo City Charter does not abridge their First Amendment freedom of association right. Unlike cases such as Anderson v. Celebrezze, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed2d 547 (1983), in which this Court found exclusion of a candidate to violate a party's freedom of association, the Newaygo City Charter prevents neither the expression of Petitioners' political view, nor formation of groups promoting this political view.

The Sixth Circuit states that "the only potential associational interests at stake here would be those of residents who mistakenly failed to pay their taxes or water and sewer assessment, or those who were unable to do so," associational interests that are not part of Petitioners' objectives. Corrigan, 55 F.3d at 1215 (6th Cir. 1995). Mr. Corrigan and Mr. Stroven associate in opposition to Mayor Kowalski, not regarding issues of tax delinquency. The tax delinquency restriction does not depend on whether one favors or opposes Mr. Kowalski as mayor. The Newaygo City Charter in no way limits persons of petitioners' political views from participating in the political process, leaving no relationship between Newaygo's City Charter and Petitioners' political opposition to Mayor Kowalski.

CONCLUSION

Petitioners suggest that the Sixth Circuit errs in determining that the Newaygo City Charter rationally relates to the purpose of enforcing the tax

system and does not violate their freedom of association. The City of Newaygo asserts that the Sixth Circuit correctly concludes that enforcement of the tax structure is a rational basis for its City Charter's default provision, that the Sixth Circuit's decision harmonizes with, rather than contradicts the Third Circuit's decision in Deibler, and that the Sixth Circuit correctly concludes that the City of Newaygo's default provision does not violate Petitioners' right to freedom of association. The City of Newaygo requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: October 5, 1995

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